

<b>ALLIED RECLAIMING SERVICES,</b>	)	<b>AGBCA Nos. 99-140-1</b>
	)	<b>99-153-1</b>
Appellant	)	<b>2000-129-1</b>
	)	
<b>Representing the Appellant:</b>	)	
	)	
Phil Patterson	)	
Allied Reclaiming Services	)	
P.O. Box 782	)	
Richfield Springs, New York 13439	)	
	)	
<b>Representing the Government:</b>	)	
	)	
Jane P. Cornwell	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
STOP 1401	)	
P. O. Box 419205	)	
Kansas City, Missouri 64141-6205	)	

**RULING ON APPELLANT’S MOTION TO COMPEL DISCOVERY**

November 9, 2000

**Before WESTBROOK, Administrative Judge.**

**Opinion for the Board by Administrative Judge Westbrook.**

These appeals arise out of Contract No. 50-6424-8-009 (the contract) for the construction of five earthfill flood water retarding dams in the Troublesome Creek Watershed, Lewis County, Missouri, between Allied Reclaiming Services (Appellant) now of Richfield Springs, New York, and the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS or Respondent) of Champaign, Illinois. The contract was awarded February 2, 1998, in the amount of \$248,238. AGBCA No. 99-140-1 is the appeal of a Contracting Officer’s (CO’s) decision denying Appellant’s claims 1-6. AGBCA No. 99-153-1 is the appeal of the CO’s decision terminating for default Appellant’s right to proceed under the contract. AGBCA No. 2000-129-1 is the appeal of the CO’s decision denying Appellant’s claims 7-9.

The Board has before it Appellant’s Motion to Compel Discovery.

**FINDINGS OF FACT**

1. Appellant served on Respondent a discovery request dated February 15, 2000, and an amendment dated March 14, 2000. Respondent represents, and Appellant does not contest, that both documents were mailed together on March 17, 2000. As pertinent to this ruling, Appellant requested “contract specs and daily logs, C.O. logs of all contracts that were inspected by or under the control of Berkley L. Barton and or Darrel Campbell.” Respondent filed a Motion for a Protective Order under Rule 14(a) seeking a protective order ordering that Respondent need not respond to the request quoted above on the ground of relevance or the alternate ground of being unduly burdensome.

2. Appellant provided a response dated April 13, 2000, to the Motion in which it limited its previous request to “the contract specs, job diaries and C.O. logs of the contracts that deal with both Troublesome and Grassy Creek Watershed inspected by or under the control of Mr. Barton and/or Mr. Campbell.” Respondent responded to this letter by stating that the limitation “would only minimize the requested documents by those from out of state.” Respondent continued to argue that the request was overly broad and unduly burdensome. On May 8, 2000, the Board conducted a telephonic conference with the parties for the purpose of allowing each to present additional argument prior to the Board’s deciding the Government’s Motion for a Protective Order. The Board stated that it was attempting to weigh the burden of producing the requested documents against the probative value of the evidence Appellant hoped they would contain. After discussion of exactly what Appellant expected the documents to contain, it became evident that what Appellant sought was evidence of any changes to the technical specification relating to earthfill. Following lengthy discussions, the parties reached a compromise. The Government agreed to produce all versions of technical specification 710 contained in contracts administered by Berkley Barton or Darrel Campbell from 1990 through the date of award of the contract. Appellant agreed that production of these specifications would satisfy its outstanding discovery request. The parties agreed that the Motion for a Protective Order was therefore moot, obviating the need for the Board to issue a ruling.

3. This matter was also discussed during a June 1, 2000 telephonic conference on another matter. The parties again agreed that Appellant’s request for all records on all contracts administered or inspected by Berkley Barton or Darrel Campbell would be satisfied by copies of all versions of technical specification 710 contained in contracts administered by those men from 1990 until the date of award of the contract. During the June 1, 2000 conference, Appellant expressed doubt that he had received all versions because he had not seen in them previous requirements that an unnamed Government employee on another project had described to him. The Board suggested that Appellant follow up with that individual and produce him as a witness if he had testimony to contradict the produced documents.

4. On August 10, 2000, the Board received from Appellant a letter stating that Respondent had to that date failed to produce “the two previous compacting method changes prior to the contract spec in our contract.” Appellant further claimed that Respondent’s agreement to provide the specification from 1990 “to the present” was made with the knowledge that providing those documents would not satisfy Appellant’s request. Appellant referred to what it termed the

Government's offer to produce material and said that the Government "totally misrepresented what they claimed would be found in the material." Appellant then requested (1) the "two previous dirt compacting spec changes" prior to the instant contract and (2) the right to review the daily logs of previous contracts in Troublesome and Grassy Creek Watershed, especially the contracts performed by Jon Simmons in 1986 and 1988.

5. Upon receipt of the August 10, 2000 letter, the Board scheduled a telephonic conference for August 16, 2000, to facilitate completion of discovery to set the appeal for hearing. During the conference, the Board informed the parties that the letter would be treated as a Motion to Compel. Appellant was granted until September 16, 2000, to amend the letter with exhibits and additional facts to make clear exactly what had and had not been furnished. Upon receipt of any amendment from Appellant, Respondent would be afforded an opportunity to respond.

6. On September 15, 2000, the Board received a letter from Appellant dated September 11, 2000, moving the Board to issue an order requiring Respondent to produce for inspection and copying (1) the two dirt compacting specification changes prior to specification section 710, "Earthfill," in the contract; and (2) the daily logs on contracts in Troublesome and Grassy Creek Watershed that were inspected by Berkley Barton and/or Darrel Campbell or under the control of Berkley Barton and/or Darrel Campbell. Appellant contends that the information it sought was not in specification sections produced by Respondent and that Respondent misrepresented "what they claimed would be found in this material." Regarding its second request, for the daily logs on contracts in Troublesome and Grassy Creek Watershed inspected by Barton and/or Campbell, Appellant argues that as Respondent had identified the two NRCS employees as prospective witnesses, it has the right to pursue areas of rebuttal or impeachment. In addition, Appellant stated that it had never intended its request to include contracts outside the Troublesome or Grassy Creek watershed. Appellant faulted Respondent for interpreting its original request as including other contracts rather than inquiring of Appellant. Appellant also argues that Respondent has admitted to having the "job diaries" in its possession and claims that they are 5"x7" and approximately ½-inches thick. Appellant provided no exhibits with the September 11, 2000 letter. Appellant offered as grounds for seeking this discovery that Respondent's intent to call Messrs. Barton and Campbell as witnesses puts their past performance and reputation in issue. Similarly, because Respondent has expressed an intent to place in evidence the deposition of Jon Simmons, his past performance and reputation is also at issue according to Appellant. Appellant provided no authority for the contention that the past performance and reputation of the witnesses becomes an issue when they testify.

7. By letter dated September 25, 1995, Appellant provided several documents, describing them as (1) "copies of specification that government counsel submitted to appellant that was claimed would provide the required information sought" and (2) what Appellant termed "a copy of the government's revised dirt compacting spec of May 1998." The first document included was a three-page document entitled "710 Small Floodwater Retarding Dams," the third page of which contained paragraph 6., "Earthfill." The pages were numbered "(710-1) through (710-3)." All three pages contained the notation "SCS-Missouri" in the bottom right-hand corner and the date "11/6/95" in the bottom right-hand corner. The second document was one page with no heading at the top.

Paragraph 6., "Earthfill," began on the middle of the left column and continued for the rest of the page. The bottom left-hand corner contained the notation "SCS-Missouri" and the bottom right-hand corner contained the date "5/23/90." On the top of the page there was the handwritten date "1990" and the third full paragraph was set off by handwritten brackets. This single page was numbered "(710-2)." The third document was two pages numbered "710-3" and "710-4." Paragraph 6. "Earthfill" began just below the middle of page 710-3 and continued for all of page 710-4. The bottom left-hand corner of both pages contained the notation "NRCS-Missouri" and the bottom right the date "2/99." The last paragraph on page 710-3 was surrounded by handwritten brackets and the word "new" was handwritten in its left margin. This paragraph continued on the top of the next page and that portion of the paragraph was also surrounded by handwritten brackets.

8. Respondent filed the Government Response to Appellant's Motion to Compel October 26, 2000, stating that its April 10, 2000 Motion for Protective Order and the accompanying Memorandum in Support remain as its primary response. Respondent also referred to the Board's May 9, 2000 letter memorializing the telephone conference in which the parties agreed to the compromise resolution of Appellant's original discovery request outlined in Finding of Fact (FF) No. 3 above. Respondent contended that on May 11, 2000, it sent Appellant the material agreed upon in the telephone conference as described in the Board's letter, i.e., all versions of specification section 710 from 1990 until award of the contract here at issue. With the October 26, 2000 response, Respondent provided all versions of specification section 710 from its inception to the date of award. Respondent argued that Appellant's request for the daily logs on contracts in the Troublesome and Grassy Creek Watershed associated with Barton and/or Campbell, is a burdensome request for irrelevant materials. Respondent cited the content of its previous Memorandum in Support of the Motion for a Protective Order for its arguments on the relevancy of the logs of other contracts. Therein, Respondent argued that the documents pertaining to other contracts lacked relevancy to the claims on the instant contract or to any alleged delays under the instant contract. Addressing Appellant's contention that Respondent had erroneously over estimated the number of contracts on which Appellant sought documents, Respondent asserted that even the modified request limited to contracts pertaining to the Troublesome and Grassy Creek Watershed and area included involves production for 117 sites and close to 150 job diaries. This information is included in four boxes of documents and approximately seven file cabinet drawers of information. The volume of material is unduly burdensome according to Respondent. Finally, Respondent disputes Appellant's assertion that the fact that Messrs. Barton and Campbell are expected witnesses or that Mr. Simmons had contracts in the areas in question justify the requested discovery.

### DISCUSSION

Board Rule 14(a) provides general policy for all discovery, stating that the parties are encouraged to engage in voluntary discovery procedures. This Board construes liberally the requirement for relevancy in discovery as embodied in Federal Rule of Civil 26(b), i.e., that it need not be admissible if the information sought is reasonably calculated to lead to the discovery of admissible evidence. Tranco Industries, Inc., AGBCA No. 77-151, 78-2 BCA ¶ 13,498. Appellant originally requested the production of "contract specs and daily logs, C.O. logs of all contracts that were inspected by

or under the control of Berkley L. Barton and or Darrel Campbell.” Respondent sought a protective order on the grounds that the material sought lacked relevancy and production would be burdensome. In an effort to weigh the expected burden to the Respondent against the possibility that production of these documents from other contracts might lead to admissible evidence, the Board conducted a telephonic conference on May 8, 2000. The Board questioned Appellant at length concerning what Appellant expected to find in these contract files that might be supportive to its claim. In a long conversation, the answer became clear that Appellant wanted evidence of any changes in the technical specification relating to earthfill. The parties thereafter agreed that Respondent would produce all versions of technical specification 710 contained in contracts administered by Messrs. Barton or Campbell. Contrary to Appellant’s assertions in the Motion to Compel, Respondent did not misrepresent what might be contained in the versions of the specification in either the May 8 conference or in a subsequent conference on June 5, 2000. During that second conference, Appellant expressed doubt that it had received all versions of the specification. He had reached this conclusion because he did not find in the produced documents previous requirements described to him by an unnamed Government employee on another project. At that time, the Board suggested that Appellant follow up with that individual and produce him as a witness if he had testimony to contradict the produced documents. There is no evidence supporting relevance of contract logs and diaries on other contracts to this appeal. Despite lack of relevance, their discovery would be permitted given a showing of a possibility they might lead to admissible evidence. In two telephonic conferences and in two written submissions, Appellant has had the opportunity to provide such a showing. Appellant has failed to do so. Respondent has now provided copies of all versions of specification section 710 since its inception. If Appellant has evidence that these are incomplete, Appellant may provide testimony to that effect at the hearing.

### **RULING**

Appellant’s Motion to Compel Discovery is denied.

---

**ANNE W. WESTBROOK**  
Administrative Judge

**Issued at Washington, D.C.**  
**November 9, 2000**